

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,
Plaintiff,
v.
BRIAN SORENSEN,
Defendant.

Case No. 2:17-cr-00244-APG-NJK

REPORT AND RECOMMENDATION

[Docket No. 139]

This matter was referred to the undersigned Magistrate Judge on Defendant Brian Sorensen's motion to dismiss superseding indictment. Docket No. 139. The Court has considered Defendant's motion, the United States' response, and Defendant's reply. Docket Nos. 139, 145, 148.

I. BACKGROUND

On August 2, 2017, a federal grand jury sitting in Las Vegas, Nevada issued an indictment charging Defendant Brian Sorensen and co-Defendant Dustin Lewis with one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349, and one count of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2. Docket No. 1. On June 22, 2021, after unsuccessful plea negotiations between the United States and Defendant, a federal grand jury sitting in Las Vegas, Nevada issued a superseding indictment charging Defendant and co-Defendant Janice Lee Jones with one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349, and three counts of bank fraud, in violation of 18 U.S.C. § 1344(1). Docket No. 116.

Defendant and the United States engaged in plea negotiations between the spring of 2020 and the summer of 2021 to attempt to resolve the instant case. Docket Nos. 139 at 2, 145 at 2-3. Throughout these negotiations, in the spring of 2021, the United States told Defendant that, if the plea negotiations were unsuccessful, it would seek a superseding indictment charging Defendant with additional counts. The United States also stated that it would seek a superseding indictment

1 charging co-Defendant Jones, who is Defendant's mother, with certain counts. *Id.* Ultimately,
2 when the plea negotiations proved unsuccessful, the United States obtained the superseding
3 indictment at issue in the instant motion. Docket Nos. 139 at 2, 145 at 3. The superseding
4 indictment charges Defendant with two additional counts of bank fraud and co-Defendant Jones
5 with four felony counts. *Id.*

6 Defendant asks the Court to dismiss the superseding indictment due to outrageous
7 government conduct. Docket No. 139 at 2. Defendant submits that the United States' decision to
8 seek a superseding indictment against him and his mother, with the statute of limitations deadline
9 approaching, "based entirely on [his] refusal to accept a plea is both shocking and outrageous and
10 is a clear violation of 'the universal sense of justice' violating due process. *Id.* at 3. Defendant
11 submits that the superseding indictment was not obtained based on an ongoing investigation or
12 newly obtained evidence, but rather to intimidate Defendant into giving up his right to a jury trial.
13 *Id.* Defendant alternatively asks the Court to dismiss the superseding indictment using its
14 supervisory power as a prophylactic tool to discourage the behavior it alleges the United States
15 relied on in obtaining the superseding indictment. *Id.* at 3-4.

16 In response, the United States submits that the case law allows "the government to bring
17 additional charges after a defendant rejects a plea offer, including charges against third parties . . .
18 so long as there is probable cause to bring those additional charges. Docket No. 145 at 1-2. The
19 United States submits that, contrary to Defendant's representations, it discovered after the initial
20 indictment had been issued that Defendant had engaged in two additional fraudulent sales and that
21 co-Defendant Jones had been involved in the three fraudulent sales charged in the superseding
22 indictment. *Id.* at 2. The United States submits that, despite this knowledge, it engaged in plea
23 negotiations with Defendant, during which it told Defendant that if he declined the plea offer,
24 additional charges might be pursued against him and other individuals. *Id.* at 2-3. The United
25 States submits that its conduct in this case falls directly in line with governing case law which
26 allows it to threaten more severe charges, both against a defendant and a third party, during plea
27 negotiations and to make good on those threats should the plea negotiations fail to resolve the case.
28 *Id.* at 3-5. The United States further submits that, since it had probable cause to indict both

1 Defendants at the time the threats to pursue a superseding indictment were communicated to
2 Defendant, it acted in good faith and, therefore, asks the Court to deny Defendant's motion to
3 dismiss the superseding indictment. *Id.* at 5-7.

4 II. ANALYSIS

5 A. Due Process

6 The Supreme Court has recognized that, sometimes, the conduct of governmental actors
7 can be "so outrageous" that a defendant's due process rights are violated, requiring a court to
8 dismiss the underlying indictment. *United States v. Russell*, 411 U.S. 423, 431-32 (1973).
9 Outrageous government conduct occurs when the government's actions are "so outrageous that
10 due process principles would absolutely bar the government from invoking judicial processes to
11 obtain a conviction." *Id.* A dismissal of an indictment for outrageous government conduct is
12 rooted in the due process clause of the Fifth Amendment of the Constitution which provides, "no
13 person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const.
14 Amend. V.

15 The Ninth Circuit has held that dismissal of an indictment for outrageous government
16 conduct is "limited to extreme cases" in which the defendant can demonstrate that the United
17 States' conduct "violates fundamental fairness" and is "so grossly shocking and so outrageous as
18 to violate the universal sense of justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir.
19 2011). This is an "extremely high standard." *United States v. Black*, 733 F.3d 294, 302 (9th Cir.
20 2013) (citing *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)).

21 Because no bright line rule exists that establishes when the United States' conduct moves
22 from acceptable to outrageous, the Court must resolve each case on its own facts, considering the
23 totality of the circumstances. *Black*, 733 F.3d at 302, 304 (citing *United States v. Bogart*, 783 F.2d
24 1428, 1438 (9th Cir. 1986)).

25 In *Bordenkircher v. Hayes*, 437 U.S. 357, 364 (1978), the Supreme Court held that it is not
26 a due process violation when the United States threatens the pursuit of more serious charges against
27 a defendant throughout the plea-bargaining process and then follows through on those threats when
28 the defendant declines to accept a plea offer, so long as the prosecutor has probable cause to

1 support the more serious charges. The Ninth Circuit has recognized that “such prosecutorial
 2 conduct is not meaningfully distinguishable from charging more strictly at the outset and then
 3 reducing the charges as a result of plea negotiations. . . .” *United States v. Gamez-Orduno*, 235
 4 F.3d 453, 463 (9th Cir. 2000). When the threat or promise of leniency involves a third party, a
 5 more pressing inquiry must be conducted, but this conduct does not violate due process if the
 6 United States has probable cause to prosecute the third party at the time the threat or offer of
 7 leniency is communicated. *United States v. Seng Chen Yong*, 926 F.3d 582, 591-92 (9th Cir. 2019).
 8 Probable cause is conclusively demonstrated by a grand jury indictment. *Id.* at 592.

9 Defendant’s main argument is that the United States’ decision to obtain a superseding
 10 indictment toward the end of the statute of limitations period “based entirely on [his] refusal to
 11 accept a plea is both shocking and outrageous and is a clear violation of ‘the universal sense of
 12 justice’ violating due process.” *Id.* at 3.¹ The case law makes clear, however, that this behavior
 13 does not constitute a due process violation. *See Bordenkircher*, 437 U.S. at 364. This includes the
 14 United States’ decision to communicate its intention to pursue charges against co-Defendant Jones
 15 and then doing so after plea negotiations failed. *See Seng Chen Yong*, 235 F.3d at 591-92. *See*
 16 *also United States v. Castello*, 724 F.2d 813, 814-15 (9th Cir. 1984) (collecting cases to support a
 17 finding that no court has found third party threats in plea bargaining *per se* unconstitutional).

18 The Court finds that the United States was well within its authority to tell Defendant it
 19 would charge him – as well as his co-Defendant – with new counts if he did not accept the plea
 20 offer so long as it had probable cause to support the additional charges. Defendant does not contest
 21 that the United States had probable cause to support these additional charges at the time they were
 22 discussed during plea negotiations. Further, the superseding indictment, issued by a grand jury,
 23 conclusively demonstrates that there was probable cause for the additional charges. *Seng Chen*

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 25 ¹ In his reply, Defendant submits that this behavior constitutes a due process violation
 26 because the United States’ behavior was intended to improperly coerce him into taking the plea
 27 offer. *See* Docket No. 148 at 3. Neither Defendant nor the United States has represented that the
 28 plea offer at the heart of the instant motion is still open and available. In fact, both parties represent
 that it was explicitly declined. *See* Docket Nos. 139 at 2, 145 at 3. Regardless, [i]mproper coercion
 actually takes effect . . . when a defendant pleads guilty as a result of the threat or offer of lenity.”
Seng Chen Yong, 926 F.3d at 592. Defendant did not plead guilty here and, therefore, his coercion
 arguments are without merit.

1 *Yong*, 235 F.3d at 592. No other facts or circumstances are presented to the Court demonstrating
2 other behavior employed by the United States during this time to support a finding that the United
3 States' conduct was "so grossly shocking and so outrageous as to violate the universal sense of
4 justice." *Stinson*, 647 F.3d at 1209. Accordingly, the Court finds that the United States' conduct
5 did not constitute a due process violation.

6 B. Supervisory Powers

7 When the governmental conduct alleged does not amount to a due process violation, the
8 Court can nonetheless dismiss the superseding indictment under its supervisory powers. *United*
9 *States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (citing *United States v. Barreara-Moreno*,
10 951 F.2d 1089, 1092 (9th Cir. 1991)). The Court can use its supervisory powers to dismiss an
11 indictment in three circumstances: to remedy a constitutional or statutory right violation where no
12 lesser remedial action is available; to protect judicial integrity by ensuring that a conviction rests
13 on appropriate considerations validly before a jury; or to deter future illegal government conduct.
14 *Id.* at 1085 (citing *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). The Court is
15 limited in exercising this power to situations where the conduct in question was flagrant
16 misconduct and where the defendant was substantially prejudiced by the conduct. *Simpson*, 927
17 F.2d at 1091. Flagrant misconduct and prejudice are assessed on a fact-specific, case-by-case
18 basis. *United States v. DeRosa*, 783 F.2d 1401, 1406 (9th Cir. 1986). Generally, a court will not
19 utilize its supervisory power in such a way that encroaches on prosecutorial discretion "unless
20 there is a clear basis in fact and law for doing so." *See id.* at 1404.

21 Defendant alleges no constitutional or statutory violation, nor does he argue that the United
22 States' actions were illegal. Rather, Defendant asks the Court to use its supervisory powers to
23 protect judicial integrity. Docket No. 139 at 4. However, Defendant has failed to demonstrate that
24 the United States' conduct constituted flagrant misconduct or that he was substantially prejudiced
25 by the United States' decision to obtain a superseding indictment in this case.

26 The United States' conduct in question is the seeking of a superseding indictment within
27 the statute of limitations period after informing Defendant that it would do so should he not accept
28 a plea offer. Generally, a prosecutor "should remain free before trial to exercise the broad

1 discretion entrusted to him to determine the societal interest in prosecution. An initial decision
2 should not freeze future conduct.” *United States v. Goodwin*, 457 U.S. 368, 382 (1982). The
3 United States’ conduct in communicating an offer of leniency is lawful tactic in plea negotiations
4 and has been long accepted by the courts. *See, e.g., Bordenkircher*, 437 U.S. at 364; *Seng Chen*
5 *Yong*, 235 F.3d at 591-92. Accordingly, the Court finds that the United States’ conduct does not
6 rise to flagrant misconduct and that no basis in law or fact exists for the Court to exercise its
7 supervisory powers to dismiss the superseding indictment.

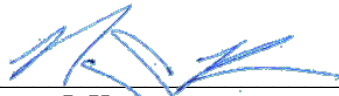
8 **III. RECOMMENDATION**

9 Based on the foregoing and good cause appearing therefore,

10 **IT IS RECOMMENDED** that Defendant’s motion to dismiss the superseding indictment,
11 Docket No. 139, be **DENIED**.

12 IT IS SO ORDERED.

13 Dated: February 4, 2022

14 
15 Nancy J. Koppe
16 United States Magistrate Judge

17 **NOTICE**

18 This report and recommendation is submitted to the United States District Judge
19 assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and
20 recommendation must file a written objection supported by points and authorities within fourteen
21 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file
22 a timely objection may waive the right to appeal the district court’s order. *Martinez v. Ylst*, 951
23 F.2d 1153, 1157 (9th Cir. 1991).
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